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Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Section 1981a authorizes an award of punitive damages on either of two distinct showings, proof of reckless indifference to federally protected rights or a demonstration of malice. Because petitioner would on remand seek an award of punitive damages on alternative grounds, we urge the Court to address the legal standard applicable to each, and we discuss those issues separately below.

We do not contend that the existing finding of intentional discrimination in this case entitles petitioner as a matter of law to an award of punitive damages; whether such damages should be awarded remains a question for the jury, which would be free to deny that remedy despite the proven discrimination. We urge only that petitioner is entitled to have a jury consider her claim for punitive damages under both of the two grounds set out in the statute.

I. THE RECKLESS INDIFFERENCE PROVISION OF SECTION 1981A(B)(1) SHOULD BE INTERPRETED LITERALLY TO REFER TO THE MENTAL STATE OF THE DISCRIMINATORY OFFICIAL

(1) *Respondent Has Failed to Articulate A Clear Alternative Standard*

The threshold problem posed by respondent's brief is the difficulty of ascertaining what standard respondent is urging this Court to adopt. Respondent's brief offers at least five different accounts of the relationship between its proposed standard and the terms "reckless indifference" in the statute.

First, respondent argues that reckless indifference will suffice only if it is accompanied by a discriminatory act.

> The Act requires that plaintiff to prove that the defendant (1) *acted* ("engaged in a discriminatory practice or discriminatory practices") (2) with . . . reckless indifference to federally protected rights. The two cannot be separated. Otherwise, . . . defendants would be punished unfairly for thoughts isolated from discriminatory actions. (R.Br. 18)(emphasis in original).

This formulation, which abandons "egregiousness" altogether, is consistent with the position of petitioner.

Second, respondent urges that a plaintiff must prove "egregiousness," but insists this is consistent with the statutory language because a demonstration of reckless indifference is sufficient per se to prove egregiousness.

> Actions undertaken with . . . reckless indifference to federally protected rights necessarily involve egregious conduct . . . .(R.Br. 13-14).[1]

This effectively abandons the decision of the court of appeals, reducing it to a semantic quibble which, while accepting proof of reckless indifference as sufficient, insists on labeling such indifference "egregious conduct."

Third, respondent suggests that the controlling legal standard is actually reckless indifference, but that evidence of egregious conduct is one method of proving the existence of reckless indifference.

> The more serious the conduct, the more likely it will cross the threshold from negligence to recklessness. (R.Br. 20).
>
> [T]he lower courts should . . . determine whether . . . the conduct is of a sufficiently egregious character to signify that the employer was recklessly indifferent. . . . (R.Br. 36).[2]

[1] R.Br. 19 ("Malicious and reckless conduct are by definition egregious"), 28 ("malice and recklessness are by definition egregious"), 28-29 ("punitive damages 'require conduct that is "outrageous", either because of the person's "evil motive" or because of his "reckless indifference" to the rights of others.' "), 29 (endorsing EEOC view that Congress "considered any conduct in violation of the statutory 'malice or reckless indifference' standard to be, by definition, egregious"), 31 ("'Punitive damages may be awarded for conduct that is outrageous, because of the defendant's . . . reckless indifference to the rights of others.' ")

[2] R.Br. 39 ("the conduct at issue was certainly not of a sufficiently egregious character to signify that the ADA was recklessly indifferent. . . .")

It is unclear from these passages whether respondent claims that evidence of egregious conduct is the sole method of proving the mental state of reckless indifference.

Fourth, respondent seems to contend that the correct standard is some unexplained concatenation of reckless indifference and egregiousness. E.g.

> [E]gregiousness and reckless are part of an equation, rather than a sum. (R.Br. 29).
>
> [T]he trial court [should make a] . . . determination as to whether there is sufficient evidence of egregious conduct under the standard of malice or reckless indifference . . . . (R.Br. 38).
>
> The award of punitive damages . . . depends on the nature of the discriminatory conduct, not simply the mental state of the defendant. (R.Br. 18)

Fifth, like the court of appeals below, respondent asserts simply that punitive damages cannot be awarded—regardless of the existence of reckless indifference—absent proof of some unusually deplorable conduct.[3] (R.Br. 20, 23). What type of action respondent or the court of appeals would require is unclear. The sort of misconduct which respondent demands is

[3] Respondent's reference to state law cases regarding punitive damages provides no support for this standard. This Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), was the authoritative analysis of common law punitive damage standards at the time Congress adopted the 1991 Civil Rights Act. That decision is entirely consistent with prevailing state court decisions under which the availability of punitive damages turns on proof of a culpable state of mind. R.L.Blatt, R.W.Hammesfahr & L.S.Nugent, *Punitive Damages: A State by State Guide to Law and Practice* 56-63 (1991)("fourteen states appear to require malice or a similar state of mind . . . to recover punitive damages"; "in twenty-three states . . . willful indifference, wanton, or reckless conduct is sufficient to sustain an award of punitive damages . . ."; "eight states . . . [require] a showing of gross negligence"); 1 L.Schlueter & K.Redden, *Punitive Damages* 514 (3d ed. 1995)("It has long been the rule, at least in most jurisdictions, that punitive damages may be awarded for acts done willfully, wantonly and in reckless indifference to others.")

described variously as "egregious" (R.Br. i, 14, 29-32), "serious" (*id.* 19, 20), "extreme" (id. 23, 28), "reprehensible" (*id.* 23), "outrageous" (*id.* 14, 24), "the worst cases" (*id.* 32) or actions demonstrating a "criminal indifference to civil obligations." (*Id.* 37).[4] Although the court of appeals insisted that this "standard" had been in use in the lower courts in section 1981 cases since at least 1985,[5] respondent is unable to articulate what it means or to explain how an appellate court could ascertain if a district court had misjudged whether a particular action was "egregious" or "outrageous."

Respondent urges this Court to hold that the discrimination proven in this case is not "egregious," but does not offer any principled explanation of how that conclusion should be reached. On the record in the instant case, a jury could find that respondent's officials engaged in a three month concerted scheme of dissembling, obstruction and outright lies in order to prevent the promotion of a woman and to cover up their illegal motives. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579 (1996)(punitive damages supported by "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive"). The court of appeals, in an indulgent turn of phrase, characterized such actions as "garden variety" discrimination (Pet. App. 18a), rather than egregious or outrageous. How the court of appeals reached that conclusion, and what legal principles might be relied on to distinguish "garden variety" discrimination from "egregious" discrimination, remain entirely obscure.

Although the substance of respondent's proposed standard is opaque, the procedure which it envisages is clearer. Respondent is suggesting that the determination of whether a particular action should be classified as "egregious" would in every instance be a question of law. In the instant case, for example, respondent insists that a single discriminatory

[4] R.Br. 37.

[5] Pet. App. 8a-9a and n.3.

promotion, coupled with dissembling, sexist epithets and objectionable off-color jokes, is not, as a matter of law, egregious; in future cases judges would have to decide which other epithets combined with how many more discriminatory promotions might add up to egregiousness. Given the variety of aggravating and mitigating circumstances that could be present in any given discrimination case, such a legal structure could over time begin to resemble the Sentencing Guidelines.

Respondent does not, however, envision that any such legal guidelines would *limit* the discretion of a district court judge to classify the actions of any particular defendant as non-egregious.

> The lower courts should implement the statutory standard for punitive damages on a case-by-case basis. . . . [T]here should be no *per se* rules defining classes of cases in which it is automatically assumed that punitive damages *will* lie. Each case will depend on the context of the evidence and all the facts and circumstances of the case. (R.Br. 36-38)(emphasis added).

Although there apparently could be per se rules forbidding punitive damages awards in particular classes of cases, no fixed standards would limit the discretion of a district judge to refuse to allow punitive awards. As a practical matter district judges, not juries, would decide whether a defendant's alleged conduct was serious enough to permit a punitive award.

The primacy of district judges would be assured by the one particular aspect of the standard urged by respondent: punitive damages could not be awarded in a case in which, as here, the district judge disagreed with the jury's finding of intentional discrimination.

> In the district court's view, the evidence was not "even suggestive of, let alone demonstrating, a gender related factor in the preference exhibited by everyone for Spangler." . . . *Thus*, the conduct at issue was certainly

not of a sufficiently egregious character . . . . (R.Br. 39)(emphasis added).[6]

Under the Seventh Amendment a federal judge could not, of course, overturn a jury verdict merely because he or she disagreed with it. *Cf. Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). Respondent suggests, however, that such a disagreement between a judge and jury would automatically preclude an award of punitive damages; that proposed rule would also be inconsistent with the Seventh Amendment.

Respondent may intend to assert yet a sixth interpretation of section 1981a, that punitive damages may only be awarded where the evidence of intentional discrimination is particularly conclusive. The court of appeals suggested that "legitimate punitive awards" would not be likely where a plaintiff had prevailed by showing that an employer's proffered explanations were pretextual (Pet. App. 21a n. 9), even though that is the standard method of proof under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. These arguments confuse the type of discrimination required for a punitive award with the type or weight of the evidence which demonstrates the existence of discrimination, and would reward a discriminatory employer that was sufficiently devious to cover up all direct evidence of its illegal motive.

(2) *The Structure of Section 1981a Does Not Require An "Egregious Conduct" Limitation on Punitive Damages*

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[6] *See* R.Br. 43(citing district judge's disagreement with jury verdict.) The court of appeals' panel decision rejected the district judge's view of the evidence, unanimously upholding the jury's liability verdict and expressly admonishing the trial judge that he was bound by the Seventh Amendment to "follow the jury's factual findings" on remand. (Pet. App. 55a-56a). Although the Court of Appeals refused to rehear *en banc* respondent's attack on that liability determination, and although this Court denied respondent's conditional cross petition on this issue (No. 98-364, Nov. 2, 1998), respondent persists in challenging the jury's verdict, repeating the same arguments concerning the evidence that were made to and rejected by the jury.

Respondent raises, and conflates, two distinct contentions—that there should be a two-tiered scheme of *liability* for compensatory and punitive damages,[7] and that there should be a two-tiered scheme for *submission to the jury* of claims for compensatory and punitive damages.[8] The first problem palpably does not exist, and the second problem is not a problem at all. Here, as in most Title VII cases, the distinction is critical.

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), all involved an issue of liability; in those cases the recklessness standard was the liability standard precisely because a showing of recklessness would without more have *mandated* an award of liquidated damages under the ADEA or an additional year of back pay under the FLSA. With regard to compensatory damages under Title VII, the intentional discrimination standard is also the liability rule; where such discrimination is shown, the trier of fact must award compensatory damages in an amount sufficient to redress any proven injury.

But, with regard to punitive damages, proof of intentional discrimination combined with reckless indifference is *not* the liability standard, because such a showing is not sufficient to entitle a plaintiff to an award of punitive damages. The trier of fact remains free to deny punitive damages, despite such a showing, if it is unconvinced that a punitive award is warranted, under the circumstances of the case, to punish or deter intentional discrimination. The trier of fact could also choose to make an award so nominal that all parties would regard the decision as equivalent to the denial of punitive damages. In the instant case, even if petitioner were to prevail in this Court, on remand, a jury convened to hear her claim for punitive damages, although bound by the existing finding of intentional

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[7] R.Br. 14, 15, 22, 23, 26, 29.

[8] R.Br. 13, 22, 28, 30, 33, 36.

discrimination, could still decide to deny any award of punitive damages. Thus, with regard to liability—even under petitioner's literal reading of section 1981a(b)(1)—the standards for compensatory and punitive awards are palpably distinct.

Not content with such a two-tiered liability scheme, respondent insists on two additional tiers. Even though juries already apply distinct standards in determining liability for compensatory and punitive awards, respondent urges that Congress also intended that judges, in determining when claims for compensatory and claims for punitive awards would be submitted to a jury, must utilize standards so different that in practice a large proportion of cases qualifying for possible compensatory awards could not even be considered by the jury on the issue of punitive damages. This would in effect construct a four-tiered system.

Respondent offers no explanation of why the number of cases in which a jury can even consider awarding punitive damages must always be substantially smaller than the number of cases in which compensatory awards are considered. Respondent does not contend that there is some reason to believe that the juries to whom these claims are submitted will fail to follow whatever instructions they are given regarding the liability standard.

(3) *A General Rule Denying Punitive Damages in "Garden Variety" Cases Would Be Inconsistent With The Express Purpose of the 1991 Civil Rights Act*

The central holding of the court of appeals majority was that there are certain types of intentionally discriminatory practices for which punitive damages should never be awarded. The court below apparently envisaged that most discrimination claims would fall within this prohibition, describing the types of discriminatory practices it wished to immunize from punitive damage awards as "garden variety" (Pet. App. 18a) or "standard" (Pet. App. 5a) discrimination. Respondent contemplates that rules could be adopted by the courts

delineating general classes of cases in which punitive damages would be forbidden.

This proposal is flatly inconsistent with the terms of the 1991 Civil Rights Act. Section 2 of the Act explains that the avowed purpose of section 1981a, including the punitive damages provision, was to provide "additional remedies . . . to deter unlawful harassment and intentional discrimination in the workplace." 42 U.S.C. §1981 Notes. This Court noted in *Landgraf v. USI Film Products* that this potential liability for additional monetary relief was enacted to "give managers an added incentive to take preventative measures to ward off discriminatory conduct by subordinates. . . ." 511 U.S. 244, 283 n. 35 (1994).

If this Court were to hold, as respondent urges, that punitive damages are as a matter of law unavailable on the facts of this case, every employer in the nation would be assured that it would be immune from any award of punitive damages if it utilized the particular discriminatory techniques proven here. More broadly, if the courts were to designate specific discriminatory practices or schemes as "garden variety," and thus outside the scope of section 1981a(b)(1), such a safe harbor would eviscerate for those types of intentionally discriminatory actions the very deterrent effect envisaged by Congress. Punitive damages should not be denied for reasons which "if applied generally, would . . . frustrate the central statutory purpose[ ] of eradicating discrimination throughout the economy." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

(4) *One of the Central Purposes of the 1991 Civil Rights Act Was To Give Litigants A Statutory Right to Trial By Jury When Either Compensatory or Punitive Damages Are Sought*

Respondent, like the court below, urges that district judges should play a, if not the, central role in determining whether punitive damages should be awarded against a given defendant,

deciding in most cases to forbid such awards, and permitting jury involvement in the decision only in extreme and atypical situations. The argument for this system is built on wisps of inference assertedly emanating from the interstices of the structure of the statute. The fatal flaw in this proposal can be found in the text: both the actual standard articulated in section 1981a(b)(1) and the terms of section 1981a(c)(1), which provides that where punitive damages are sought "any party may demand a trial by jury." 42 U.S.C. §1981a(c)(1).

Questions regarding the respective roles of juries and judges under the 1991 Civil Rights Act must be addressed in light of the special importance which the Act, and those who supported it, attached to assuring that where damages were sought either party would have a statutory right to a jury trial. Although Congress has provided in many hundreds of statutes for awards of damages, section 1981a(c)(1) is one of the few laws which expressly confers a statutory right to trial by jury.[9] The inclusion in the 1991 Act of that statutory right was of practical importance; absent that provision there would have been no jury trial right in Title VII cases against federal agencies or in Title VII cases tried in state courts. More importantly, supporters and opponents alike understood that the 1991 Act deliberately worked a sea change in the Title VII enforcement process by according to the victims of intentional discrimination the right to have their claims decided by juries.

In the highly partisan legislative history of the 1991 Act, the proposal to provide for jury trials in intentional discrimination cases was one of the most bitterly fought over issues. The inclusion in the legislation of a provision for compensatory and punitive damages was prompted in particular

[9] A computer search of the public laws enacted since 1978 reveals only three other statutes which expressly provided for a jury trial for a specific type of civil action. All of those laws involved employee rights. 2 U.S.C. §1408(c)(Congressional Accountability Act); 28 U.S.C. § 3901(b)(Presidential and Executive Office Accountability Act); 29 U.S.C. §626(c)(2) (Age Discrimination in Employment Act).

by the inefficacy of back pay as a remedy in sexual harassment cases, *Landgraf*, 511 U.S. at 254, and by the perceived inequity in denying to Title VII plaintiffs remedies available under section 1981. From the beginning of the legislative process, the drafts passed by the House and Senate also included a right to a jury trial where such damages were sought. Although employers and congressional opponents quickly agreed that more monetary relief should be provided under Title VII, they fiercely, but ultimately unsuccessfully, resisted jury trials.

The issue which divided Congress for more than a year was framed by a series of alternatives, consistently rejected on the floor of both houses, which would have replaced damages and jury trials with what were labeled "equitable monetary awards" to be made by and at the discretion[10] of the district judge.[11] The critical distinction between these proposals and the language repeatedly adopted by the House and Senate, and ultimately agreed to by the President, was whether judges or juries would award the additional monetary relief which both sides agreed was needed. The proposed substitute measures all contained language overturning the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); the practical effect of those provisions, as members of both houses repeatedly noted, was thus to authorize jury trials and compensatory and punitive damages for a plaintiff seeking relief under section

[10] Supporters of the legislation objected to giving judges discretion to deny relief. 136 Cong. Rec. S16564 (daily ed. Oct. 24, 1990)(remarks of Sen. Kennedy)("The White House bill . . . would give courts vast discretion to deny any meaningful remedy to victims of even the most offensive types of sexual and religious discrimination on the job"); 137 Cong. Rec. H 3860 (daily ed. June 4-5, 1991)(remarks of Rep. Hughes). Under the Michel substitute, egregious conduct was a factor a judge could have considered in determining whether to award additional monetary relief.

[11] 136 Cong. Rec. S9839 (daily ed. July 17, 1990)(Kassebaum substitute); 137 Cong. Rec. H3897 (June 4-5, 1991)(Michel substitute); House Doc 101-251, Civil Rights Act of 1990: Message from the President of the United States Transmitting Alternative Language to S. 210, sec. 8(legislation submitted by President Bush).

1981 for employment discrimination on the basis of race. Thus the core issue which divided Congress in 1990-91 was whether juries should also be available to victims of discrimination on the basis of sex.

The opponents of the 1991 Act objected openly and repeatedly to the proposal to permit juries to decide Title VII intent cases.[12] Their central complaint was that juries were more likely than judges to find intentional discrimination. Critics repeatedly cited a study which, they warned, showed that juries had ruled in favor of employees in a large percentage of state employment cases.[13] Representative Hyde declaimed, "I would like some way to avoid jury verdicts because that is what terrorizes the employer."[14] Representative Stenholm complained that employers should not be subject to the risk of litigation about their employment decisions because they could not be confident that they "can convince a jury that those decisions w[e]re justified," warning that some firms would close rather than run that risk.[15] Senator Hatch said a system of jury trials would be "stacked in . . . favor" of civil rights

[12] 136 Cong. Rec. S16584 (daily ed. Oct. 24, 1990)(remarks of Sen. Helms)(objecting to "unlimited jury trials"), H6773 (daily ed. Aug. 2, 1990)(remarks of Rep. Sensenbrenner)("[b]ecause this is a jury trial system, we turn unlawful employment activities into torts, and the entire tort law system, with all of the warts"), H6775 (remarks of Rep. LaFalce)("my biggest problem . . . is . . . giving plaintiffs an absolute right to demand a jury trial upon an allegation of intentional discrimination"), H6798 (remarks of Rep. Bartlett), H6811 (remarks of Rep. Sensenbrenner), H9991 (remarks of Rep. Stenholm); 137 Cong. Rec. S15468 (daily ed. Oct. 30, 1991)(remarks of Sen. Symms), H3874 (daily ed. June 4-5, 1991)(remarks of Rep. Dornan), H3901 (remarks of Rep. McCollum), H3930 (daily ed. June 5, 1991)(remarks of Rep. Hyde), H3932 (remarks of Rep. Goodling), H9536 (daily ed. Nov. 7, 1991)(remarks of Rep. Sensenbrenner).

[13] 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(remarks of Sen. Thurmond), H6787 (daily ed. Aug. 2, 1990)(remarks of Rep. Ballenger), H6802 (remarks of Rep. Ray).

[14] 136 Cong. Rec. H9403 (daily ed. Oct. 11, 1990).

[15] 136 Cong. Rec. H9991 (daily ed. Oct. 17, 1990).

plaintiffs,[16] and Senator Thurmond endorsed a statement by the Chamber of Commerce claiming that juries would disregard "the legal instructions provided by the judge."[17] Opponents repeatedly argued that if jury trials were permitted that would somehow result in the use of quotas.[18] Representative DeLay denounced the proposal for jury imposed damages as "vicious and vindictive."[19]

Jury trial supporters did not deny that juries might well decide cases differently than judges; manifestly, the long and ultimately successful fight for jury trials was premised on just that conviction. As was true at the time of the adoption of the Seventh Amendment, "[t]hose who favored juries believed that a jury would reach a result that a judge either could not or would not reach." *Parkland Hosiery v. Shore*, 439 U.S. 322, 344 (1979)(Rehnquist, J., dissenting). But supporters insisted that the juries would nonetheless be fair. Opponents argued that juries would be arbitrary and unpredictable[20] and expressed doubts as to their competence to decide liability issues.[21] In response, jury trial supporters asserted that critics of that proposal "seem to have little faith in the intelligence and

[16] 136 Cong. Rec. S16566 (daily ed. Oct. 24, 1990).

[17] 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(statement submitted by the United States Chamber of Commerce).

[18] 136 Cong. Rec. H9402 (daily ed. Oct. 11, 1990)(remarks of Rep. Hyde); 137 Cong. Rec. H3860 (daily ed. June 4, 1991)(remarks of Rep. Vucanovich), H3864 (remarks of Rep. Hyde), H3885 (remarks of Rep. Gunderson), H3885 (remarks of Rep. Gunderson), H3894 (remarks of Rep. Hyde), H3942 (daily ed. June 5, 1991)(remarks of Rep. Gunderson).

[19] 136 Cong. Rec. H6789 (daily ed. Aug. 2, 1990).

[20] 136 Cong. Rec. S9340 (daily ed. July 10, 1990)(remarks of Sen.Thurmond)(jury trials will be a "high-stakes lottery")(letter from United States Chamber of Commerce), S9897 (daily ed. July 18, 1990)(remarks of Sen. Gorton)(plaintiffs will sue in hopes of winning a "jackpot"), H6791 (daily ed. Aug. 2, 1990)(plaintiffs will "gamble for huge awards").

[21] 136 Cong. Rec. H9989 (daily ed. Oct. 17, 1990)(remarks of Rep. Fawell).

common sense of jurors."[22] Representative Collins contended that opposition to the legislation

> shows a fear of the American people. Why do I say this? Because damages are decided by juries. And juries are American. Are we afraid that the same people who entered a voting booth and elected us to our office can't be trusted to enter a jury room and make a decision on punitive damages?[23]

Supporters of the legislation offered detailed rebuttals to a number of the attacks on civil juries. In reply to assertions that juries were likely to make outlandishly large awards,[24] the sponsors proffered studies showing that jury awards in past discrimination cases had generally been modest.[25] Responding to claims that the availability of jury trials would lead to a flood of litigation,[26] they noted that no such problem had existed under section 1981.[27] Significantly, however, no supporter ever rose to dispute assertions that juries might rule in favor of discrimination plaintiffs where judges would not, or to express the hope that that would not occur.

Because of an ongoing controversy about the paucity of women and minorities among federal judicial appointments,

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[22] 136 Cong. Rec. H6800 (daily ed. Aug. 2, 1990)(remarks of Rep. Vento).

[23] 137 Cong. Rec. H3859 (daily ed. June 4, 1991); *see id.* H3949 (daily ed. June 5, 1991)(remarks of Rep. Collins).

[24] E.g. 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(remarks of Sen. Thurmond)(statement of U.S. Chamber of Commerce), S15331 (daily ed. Oct. 16, 1990)(remarks of Sen. Hatch), H6787 (daily ed. Aug. 2, 1990)(remarks of Rep. Ballenger), H6802 (remarks of Rep. Shumway).

[25] 136 Cong. Rec. S9908 (daily ed. July 18, 1990)(remarks of Sen. Kennedy), H6812 (daily ed. Aug. 2, 1990)(remarks of Rep. Edwards), H9982 (daily ed. Oct. 17, 1990)(remarks of Rep. Henry).

[26] E.g. 136 Cong. Rec. S16580 (daily ed. Oct. 24, 1990)(remarks of Sen Burns), H6786 (daily ed. Aug. 2, 1990)(remarks of Rep Moorhead).

[27] 136 Cong. Rec. H6790 (daily ed. Aug. 2, 1990)(remarks of Rep. Slattery), H6800 (remarks of Rep. Vento).

jury trial proponents were well aware, for example, that if judges were responsible for deciding whether there should be punitive awards for sex discrimination, the vast majority of those decisions would be made by men and men alone.[28] On the other hand, federal law as well as the Constitution, assured that a civil jury would include men and women with a wide range of experiences and perspectives. *See* 28 U.S.C. §§ 1861, 1863. Congress could sensibly conclude that a jury, composed of individuals with such diverse backgrounds, would bring to the determination of intentional discrimination cases an invaluable understanding of the realities of the workplace, the nuances of race and gender relations, and the complexities of human motivation. In the instant case, the district judge's frank disagreement with the jury's finding of intentional discrimination illustrates the practical impact of Congress' decision to authorize jury trials.

The legislative history of section 1981a(b)(1) is wholly consistent with a literal reading of the statute. *See* Pet. Br. at 36-45. During the floor debates, most of the references to the substance of what became section 1981a(b)(1) either recited the actual terms of that provision or simply lumped compensatory and punitive damages together, describing both as available

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[28] In 1988, a year before it began work on what would become the 1991 Civil Rights Act, the Senate Judiciary Committee held a hearing devoted specifically to the small number of women and minorities who had been appointed to the federal bench since 1980. Hearings Before The Senate Judiciary Committee on the Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench, 100th Cong., 2d Sess. (1988). The hearing was prompted in particular by the fact that in the 1980's, at a time when the number of women attorneys was growing dramatically, the proportion of women on the federal judiciary was actually declining; in 1987-88, 94.6% of all judicial nominees were men. *Id.* at 2. From 1981 to 1988 all of the 14 new judges in the District of Columbia circuit were white men. *Id.* 42. One witness argued pointedly, "It is unseemly that all, or nearly all sex and race discrimination claims in a given court should be heard by white male judges." *Id.* at 144 (testimony of Estelle Rogers).

where intentional discrimination was proven.[29] Opponents objected either that punitive damages might indeed be available in every case of intentional discrimination[30] or that the statutory standard was too vague.[31] The scant references to the role of judges under the proposed legislation referred only to the limited authority of a judge to act *after* a jury verdict.[32]

At the end of this protracted struggle Congress adopted virtually unchanged the original proposal for jury imposed damages, subject to a cap. Senator Jeffords explained that at the beginning of the legislative process

[29] E.g. 136 Cong. Rec. H6779 (daily ed. Aug. 2, 1990)(remarks of Rep. Schroeder)("[y]ou do not get punitive damages unless there was intent"), H6793 (remarks of Rep. Hoyer)("these damages are available only in cases of intentional discrimination"), H6800 (remarks of Rep. Kleczka)(the legislation "would add compensatory and punitive damages under title VII for victims of intentional job bias"), H9993 (daily ed. Oct. 17, 1990)(remarks of Rep. Scheuer)(legislation "allows compensatory and punitive damages for proven intentional discrimination"); 137 Cong. Rec. H3874 (daily ed. June 4, 1991)(remarks of Rep. Moody)("[f]or punitive damages, discrimination must be shown to be intentional"), H3888 (remarks of Rep. Owens)(legislation permits "victims of intentional discrimination . . . to collect monetary compensatory and punitive damages").

We do not suggest that these remarks can displace the additional statutory requirement of proof of reckless disregard or malice, but they illustrate the fallacy of the court of appeals' supposition that Congress must have believed the standards for compensatory and punitive damages were dramatically different.

[30] 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(remarks of Sen Thurmond)(statement of United States Chamber of Commerce)("because the Act adopts a 'reckless disregard of the rights of others' standard, and because intentional discrimination necessarily involves a disregard of others' rights, punitive damages would seem to be available in virtually every case involving intentional discrimination.")

[31] *Id.*; 136 Cong. Rec. H6779 (daily ed. Aug. 2, 1990)(remarks of Rep. Fawell).

[32] 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991)(remarks of Rep. Edwards); S15484 (daily ed. Oct. 30, 1991)(remarks of Sen. Dole).

> [T]he creation of tort-like damages under title VII was viewed as a longshot at best . . . [but now] such damages are a central part of every civil rights proposal. . . . In one form or another, this is an idea whose time has come. In fact, the only remaining questions appear to be whether such damages will be unlimited as to amount or capped and, to a lesser extent, whether they will be awarded by judges or juries. . . . [W]hile the compromise calls for damages awarded by juries, getting the administration to give in on this point was a major achievement leading to this agreement.

137 Cong. Rec. S15383 (daily ed. Oct. 29, 1991).

The terms and legislative history of section 1981a(b)(1) are complemented by Congress's overarching decision, reached after a protracted struggle and embodied in the text of the statute, that where compensatory or punitive damages were sought, either party was entitled to have a jury decide the measure and availability of those damages. The 1991 Act should not be interpreted in a way which denigrates the central enforcement role which Congress intended to accord to civil juries, or on the basis of objections to those juries which Congress considered and rejected.

II. THERE IS NO INDEPENDENT ALTERNATIVE BASIS FOR DISMISSING PETITIONER'S CLAIM FOR PUNITIVE DAMAGES UNDER THE MALICE PROVISION OF SECTION 1981A(B)(1)

Respondent does not squarely dispute the correctness of the legal standard set out in our opening brief; rather, respondent urges as an alternative ground for affirmance that the circumstances of this case do not satisfy that standard.

Respondent first advances a factual argument. We stressed in our brief that Wheat had repeatedly used the terms "bitch" and "battleaxe" to refer to professionally prominent women, and had persisted in telling lewd jokes at office meetings even

after plaintiff objected. Respondent contends that these actions "certainly do not signify" any form of hostility toward women. (R.Br 42). The assessment of the significance of these actions, however, is the quintessential function of the trier of fact. Although not required to do so, a reasonable jury could assuredly conclude that such remarks revealed an animus or demeaning attitude towards women. While, for example, the term "bitch" has a variety of meanings, one of them is an expression of animus toward women who are ambitious or who use their authority in a manner contrary to the wishes of the man speaking;[33] that particular usage of "bitch" fits the circumstances in which the disputed remarks occurred in this case. The lower courts have repeatedly recognized that use of the term "bitch" can be sufficiently gendered and offensive to constitute a significant element of a sexual harassment claim.[34]

Second, respondent urges that statements by participants in a decisionmaking process expressing animus towards women are legally irrelevant unless those statements are "related to the employment decision in question." (R.Br. 42). But whether such remarks are "related to" an allegedly discriminatory act is precisely the issue which the trier of fact must decide. Although biased statements often would not be conclusive,

[33] The evolution in the meaning of this epithet is traced in Beverly Gross, "Bitch", *Salmagundi: A Quarterly of the Humanities & Social Sciences*, no. 103, p. 146 (1994). "The metamorphosis of bitch from the context of sexuality (a carnal woman, a promiscuous woman) to temperament (an angry woman, a malicious woman) to power (a domineering woman, a competitive woman) is a touchstone to the changing position of women through this century." *Id.* at 141. *See id.* at 146 ("the male equivalent of the word bitch [is] 'Boss'"), 148 (the various usages of "bitch" include "a woman who is annoying, pushy, possibly underhanded (in short, a man in a woman's body)").

[34] *Excel Corp. v. Bosley*, 1999 WL 16392 *1 (8th Cir. 1999); *Barna v. City of Cleveland*, 1998 WL 939884 *2 (6th Cir. 1998); *Howard v. Burns Bros., Inc.*, 149 F. 3d 835, 838-39 & n. 2 (8th Cir. 1998); *Mockler v. Multnomah County*, 140 F. 3d 808, 811 (9th Cir. 1998); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F. 3d 429, 434 (1st Cir. 1997).

such "remarks can certainly be *evidence* that gender" played a role in a disputed employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)(emphasis in original). Hostile or demeaning statements about or directed at women or minorities are significant because they may well reveal the existence of fixed and persistent prejudices likely to animate decisions at another point in time. The fact that a supervisor announced in March that he had a cold would not explain why he closed a window in December; but the fact that the supervisor in 1997 referred to an African-American worker as a "nigger" would obviously be relevant to determining his motives in dismissing that worker in 1998.[35]

Third, although conceding that Wheat had "significant input into the promotion decision" (R.Br.40), respondent insists that any misogyny on Wheat's part is irrelevant because Allen "did not simply act as a conduit" for Wheat's prejudices. (R. Br. 41). But evidence of a subordinate's bias remains relevant "where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin v. Washington Convention Ctr.*, 142 F. 3d 1308, 1312 (D.C.Cir. 1998).[36] Even if Allen did not act at Wheat's direction and control, Wheat's attitudes

[35] The appropriate method of analyzing such evidence was correctly summarized in the jury instruction on this issue quoted in *McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals*, 140 F. 3d 288, 301 n.8 (1st Cir. 1988), *cert. denied*, 119 S. Ct. 870 (1999).

[36] The lower courts have recognized the wide variety of ways in which the biased actions of one official can shape the employment decisions of another. *Long v. Eastfield College*, 88 F. 3d 300, 307 (5th Cir. 1996)(first official recommended dismissal of plaintiff); *Stacks v. Southwestern Bell Yellow Pages*, 27 F. 3d 1316, 1323 (8th Cir. 1994)(first official controlled information provided to the second); *Simpson v. Diversitech Gen'l, Inc.*, 945 F. 2d 156, 160 (6th Cir.1991)(first official filed adverse personnel report), *cert. dismissed*, 502 U.S. 1083 (1992); *Shager v. Upjohn Co.*, 913 F. 2d 398 (7th Cir. 1990)(first official assigned plaintiff more difficult tasks and issued adverse job performance evaluations); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F. 2d 1554, 1565 (11th Cir. 1987)(first official discussed proposed discharge with second official).

and actions could easily have tainted and shaped the outcome of the decisionmaking process.[37]

Cases such as this involving the interaction of several decisionmakers are controlled by this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Once a plaintiff establishes that malice played a significant role in a disputed employment decision, the defendant bears the burden of proof of establishing that it would have made the same decision even in the absence of that prejudice. 490 U.S. at 239-47. Although it is possible that on remand respondent will be able to persuade the trier of fact, as it urges here, that "Allen's role as the decisionmaker diminishes the significance" (R.Br. 42) of any malice on Wheat's part, no basis exists for imposing such a conclusion as a matter of law.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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[37] Because Wheat failed for several weeks to pass on petitioner's interest in the promotion, Allen may largely have made up his mind in favor of Spangler by the time petitioner applied. Wheat's action in allegedly misrepresenting the quality of petitioner's writing, while sanctioning for Spangler alone the special briefings from O'Donnell, would assuredly have skewed Allen's view of the comparative merits of the candidates. Wheat's recommendation of Spangler may have confirmed the result of a process that was unfairly tilted against petitioner from the start. Actions taken by Wheat played a determinative role in the decisionmaking process.